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## Aviation Flight Insurance And The Law Of Reformation

### *Mutual of Omaha Insurance Co. v. Russell*<sup>1</sup>

"Does the speed of the modern jet age and the restless, irrepresible, increased tempo of all who are in its vortex impose on a flight insurer the obligation toward prospective policy buyers of explaining the distinctive differences of the several available coverages?"<sup>2</sup> The court's negative response to this eloquently presented, but oversimplified issue in *Russell* represents a step backward from the steadily growing case law affording greater protection to the consumer, even from his own contracts.<sup>3</sup>

Mrs. Russell was to fly from Kansas City, Missouri, to Lubbock, Texas, to attend her brother's funeral. While passing one of the defendant insurer's vending machines in the Kansas City air terminal, it was decided that Mrs. Russell should have flight insurance to cover her during the trip. The machine was equipped to dispense insurer's policy T-20. This very limited policy covered only accidents occurring aboard an airplane or in going to or from an airport in an established limousine. The policy was to remain in effect for the round trip or for twelve months, whichever occurred first.

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1. 402 F.2d 339 (10th Cir. 1968), *cert. denied*, 394 U.S. 973 (1969).

2. *Id.* at 340.

3. See, e.g., *American Serv. Mut. Ins. Co. v. Bottum*, 371 F.2d 6 (8th Cir. 1967); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See generally Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 YALE L.J. 485 (1967); Donnelly, *After the Fall of the Citadel: Exploitation of the Victory or Consideration of All Interests?*, 19 SYR. L. REV. 1 (1967); Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); Note, *Consumer Legislation and the Poor*, 76 YALE L.J. 745 (1967).

Not having the correct change to operate the machine, the Russells stepped to defendant's nearby sales booth which bore a sign reading "Flight Insurance" and was attended by a salesgirl. Mr. Russell asked for either "flight insurance" or insurance that would cover his wife on her round trip flight.

The insurer sold eleven different types of coverage from the sales booth. Without asking Mrs. Russell what type of coverage she desired, the salesgirl produced an application form for type T-18 which she completed in response to Mrs. Russell's answers. When asked how long Mrs. Russell would be gone, it was decided that four days should be allowed to cover the round trip. The salesgirl inserted four days in the appropriate block on the application and presented it to Mrs. Russell for her signature.<sup>4</sup>

Mrs. Russell arrived safely in Lubbock. The airliner in which Mrs. Russell was returning to Kansas City crashed shortly before midnight of the fourth day after she had purchased her insurance policy. When the defendant denied liability on the basis that the policy had lapsed, plaintiff brought suit seeking either to have the policy construed to cover Mrs. Russell's death or to have the policy reformed to provide coverage for the return flight. The district judge held that the unambiguous contract did not cover the accident as written.<sup>5</sup> He did hold, however, that the contract should be reformed to cover the accident. He found that in view of the fact that the coverage of flight insurance is generally known, there exists a positive duty to explain the differences between a short term accident policy that the insurer attempts to sell and the more generally known flight insurance.<sup>6</sup>

The Court of Appeals for the Tenth Circuit reversed. The court recognized that traditional notions of the non-variability of the written contract produce hardships, but found that such a duty of explanation "... would be fraught with great danger to the stability of contracts."<sup>7</sup> The court's decision, though supportable within the traditional principles of the law of reformation, is a departure from the liberal construction in favor of the insured in aviation flight insurance contracts. It is the purpose of this note to demonstrate that there are valid reasons for extending the remedy of reformation beyond its traditionally narrow limits.

This particular body of insurance law is relatively new and the cases are not yet numerous. The extensive use of vending machines in selling flight insurance has been a significant factor in the litigation to date. It is appropriate to note that all cases of flight insurance discussed herein involve sales by vending machines. Before *Russell*, the cases could be divided into four categories.<sup>8</sup> In two of these categories the insurance company was the perennial victor. In the

4. The insurance form, as filled in for Mrs. Russell, is reproduced in 402 F.2d at 341 n.5.

5. 402 F.2d at 342.

6. *Id.* at 342, 343 n.9.

7. *Id.* at 346.

8. Flight insurance policies have also involved the question of reasonable notice to the insurer. See *Mutual Benefit Health & Accident Ass'n v. Brunke*, 276 F.2d 53 (5th Cir. 1960); *Fidelity & Cas. Co. v. Commander*, 231 F.2d 347, 352 (4th Cir. 1956).

other two categories the insured was the consistent winner in one and suffered only a single significant defeat in the other.

The easiest category to explain is that which deals with the maximum amount of flight insurance in force on the insured at the time of his death. This situation occurs when the insured purchases more than the permissible maximum insurance stated on the vending machine or in the policy. It is not surprising that there is no liability for amounts in excess of the stated maximum. In *Slater v. Fidelity & Casualty Co.*,<sup>9</sup> the court held that the beneficiary of three \$5,000 policies could not recover where the insured had already taken out five other \$5,000 policies naming his wife as beneficiary where there was a limit of \$25,000 to be in force at any one time.<sup>10</sup>

Insurance companies have also been successful where the insured, holding a round trip ticket, is killed or injured in an aviation related activity which does not occur on the flight for which he holds a ticket. In *Thomas v. Continental Casualty Co.*,<sup>11</sup> insured, holder of a round trip ticket from Witchita, Kansas, to San Salvador, purchased flight insurance to cover his round trip. While in San Salvador, he was killed when a private aircraft in which he was riding collided with an airliner. The policy was to cover certain losses "... caused by an accident occurring while this policy is in force and resulting directly and independently of all other causes in loss covered by this policy *during* the one way or round trip stated in the schedule for which a transportation ticket has been issued to the insured. . . ."<sup>12</sup> In affirming summary judgment for the insurer, the court of appeals held that the plain and ordinary meaning of the policy was that it only covered the enumerated losses *during the air transportation* for which a ticket had been purchased. Injuries sustained prior to return to the point of origin wholly unrelated to this transportation were not covered.<sup>13</sup> Similarly, recovery has been denied a passenger injured inside an airport terminal during an hour's stopover between flights.<sup>14</sup> The policy covered accidents "... while a passenger . . . in an aircraft. . . ."<sup>15</sup> The court rejected the argument that since plaintiff was in the air terminal as an incident to her flight that she was a passenger in an aircraft within the meaning of the policy.<sup>16</sup>

The insured's beneficiaries have been consistently successful where the insured was killed on a flight other than the one on which he was scheduled to fly or for which he had purchased a ticket. Flight insurance policies generally limit coverage to the first one way or round trip for which a ticket is held after purchase of insurance except that if the original transportation ticket is *exchanged* for a new ticket, the

9. 277 App. Div. 79, 98 N.Y.S.2d 28 (1950).

10. See also *Fidelity & Cas. Co. v. Smith*, 189 F.2d 315 (10th Cir. 1951). In this case, the insurer paid a \$10,000 policy. It denied all liability on a second policy of \$20,000. Because the policy provided for maximum coverage of \$25,000 per passenger, suit was instituted by the beneficiary only to recover the \$15,000 balance. *Id.* at 317.

11. 225 F.2d 798 (10th Cir. 1955).

12. *Id.* at 800 (emphasis added).

13. *Id.* at 801.

14. *General Am. Indem. Co. v. Pepper*, 161 Tex. 263, 339 S.W.2d 660 (1960).

15. *Id.* at 660 n.1.

16. *Id.* at 661, 662.

substitute trip will be covered.<sup>17</sup> In *Fidelity & Casualty Co. v. Smith*,<sup>18</sup> the court found that airlines did not customarily exchange tickets of other airlines.<sup>19</sup> The insured's failure to exchange the ticket in no way affects the risks of the insurance company. As far as the insurer is concerned, the risk is no greater if a new ticket is purchased from the proceeds of a cashed-in ticket, or if the second ticket was merely obtained in a direct exchange for the first ticket.<sup>20</sup> The courts have not permitted the insurer to escape liability because of this "ticket exchange" provision whether or not the second ticket was for a substitute flight<sup>21</sup> or where there has been a change in itinerary or route taken.<sup>22</sup> This result is limited to cases where the insurance contains a provision for coverage of substitute flights.<sup>23</sup>

The fourth category of cases involves an insured who is killed while a passenger on a non-scheduled airline. In these instances, the courts generally allow recovery despite the existence of the requirement that the insured be travelling on a scheduled airline at the time of his death.<sup>24</sup> Recovery has been permitted where decedent purchased flight insurance from a vending machine located in front of the counter at which she had purchased her ticket on a non-scheduled airline.<sup>25</sup> In *Lachs v. Fidelity Casualty Co.*,<sup>26</sup> the court reasoned that by placing its machine in front of the counter of a non-scheduled airline, the insurer had invited the airline's passengers to buy its insurance. The term "scheduled airline" became ambiguous and presented a question of fact to be resolved by the jury.<sup>27</sup> Although the court indicated that the insurer might escape ambiguity by providing a definition of

17. See *Fidelity & Cas. Co. v. Smith*, 189 F.2d 315, 317 n.1 (10th Cir. 1951); *Rosen v. Fidelity & Cas. Co.*, 162 F. Supp. 211, 212 n.1 (E.D. Pa. 1953); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 292, 27 Cal. Rptr. 172, 180 (1962).

18. 189 F.2d 315 (10th Cir. 1951), criticized in 36 MARQ. L. REV. 109 (1952).

19. 189 F.2d at 318.

20. *Id.*

21. *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962), commented on in 16 STAN. L. REV. 191 (1963).

22. *Fidelity & Cas. Co. v. Smith*, 189 F.2d 315 (10th Cir. 1951); *Rosen v. Fidelity & Cas. Co.*, 162 F. Supp. 211 (E.D. Pa. 1958).

23. In *Tannenbaum v. Continental Cas. Co.*, 28 Misc. 2d 860, 214 N.Y.S.2d 988 (Sup. Ct. 1961), the court denied recovery where insured purchased insurance for a round trip flight from Dallas to Chicago and traded in his ticket in Chicago, purchased a ticket to Houston, flew from Chicago to Fort Worth, took a bus to Dallas, flew to Houston and was killed in a return flight to Dallas. The court distinguished both *Rosen* and *Smith* on the ground that in those cases, there was no question of returning to the original point or deviating beyond such point, and the policies in those cases provided coverage for substitute and side trip coverage not included in the Continental policy.

24. *Fidelity & Cas. Co. v. Commander*, 231 F.2d 347 (4th Cir. 1956); *Messina v. Mutual Benefit Health & Accident Ass'n*, 228 F. Supp. 865 (D.D.C. 1964), *aff'd*, 350 F.2d 458 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 908 (1966); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962); *Lachs v. Fidelity & Cas. Co.*, 306 N.Y. 357, 118 N.E.2d 555, *reargument denied*, 306 N.Y. 941, 120 N.E.2d 216 (1954). *Contra*, *Thompson v. Fidelity & Cas. Co.*, 16 Ill. App. 2d 159, 148 N.E.2d 9, *cert. denied*, 358 U.S. 837 (1958). See also *McBride v. Prudential Ins. Co. of America*, 147 Ohio St. 461, 72 N.E.2d 98 (1947), where the court held that insured's death in a chartered plane was not covered under an ordinary life insurance policy where the policy excluded aviation risks except as a passenger on a regularly scheduled passenger flight of a commercial aircraft.

25. *Lachs v. Fidelity & Cas. Co.*, 306 N.Y. 357, 118 N.E.2d 555 (1954).

26. *Id.*

27. 118 N.E.2d at 559.

"scheduled airlines,"<sup>28</sup> later courts have not been inclined to allow the insurer to avoid liability merely by providing such a definition.

In *Fidelity and Casualty Co. v. Commander*,<sup>29</sup> insured purchased a ticket from an American Airlines ticket counter for a flight from Newark, New Jersey, to Provincetown, Massachusetts. The flight was from Newark to Boston to Provincetown. The Newark to Boston leg was via American Airlines. The trip from Boston to Provincetown was via the Provincetown-Boston Airline, a non-scheduled airline. American booked passage for insured on the Provincetown-Boston line. The insurance policy that was filled in to provide coverage between Newark and Provincetown provided coverage while a passenger on a flight operated by a "Civilian Scheduled Airline" or "... while riding in or on a conveyance under the complete control of the Insured, provided or arranged for, directly or indirectly, by such airline. . . ."<sup>30</sup> Fidelity denied liability when insured was killed on the non-scheduled airline. In affirming, the court of appeals agreed with the finding of the district court that the various provisions of the insurance contract were disjunctive and allowed recovery notwithstanding the fact that the "conveyance" on which insured was riding when killed was a non-scheduled airline.<sup>31</sup>

The policy purchased by insured in *Messina v. Mutual Benefit Health & Accident Association*<sup>32</sup> provided coverage "... while riding as a passenger in . . . an aircraft operated on a regular, special or chartered flight (a) by a scheduled airline . . . (d) by, or contracted for by, the Military Air Transportation Service (MATS) of the United States. . . ."<sup>33</sup> The insurance was to cover a flight from Tachikawa Air Force Base, Japan, to Washington, D.C. Insured flew from Tachikawa to Travis Air Force Base, California, on a MATS chartered flight. He then purchased a ticket from San Francisco International Airport to Washington, D.C., upon his arrival at Travis. He also purchased a ticket on a Travis Transportation Company flight to carry him the sixty-seven miles from Travis to the San Francisco Airport. Travis Transportation Company was not a scheduled airline nor was it contracted for by MATS. It was permitted to operate out of the air base under a revocable permit issued by the Base Commander. Finding various ambiguities in the policy as well as the absence of a clear warning of a gap in coverage, the court found that insured was covered by the terms of the contract. The court concluded that various references to "special" and "chartered" flights would lead a reasonable person in insured's position to believe that the flight was covered.<sup>34</sup>

The only reported case in which an insurance company was successful in defending on the ground that the aircraft in question was

28. *Id.* at 562.

29. 231 F.2d 347 (4th Cir. 1956).

30. *Id.* at 350.

31. *Id.* at 351.

32. 228 F. Supp. 865 (D.D.C. 1964), *aff'd*, 350 F.2d 458 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 908 (1966).

33. 228 F. Supp. at 867.

34. *Id.* at 868.

not operated by a scheduled airline is *Thompson v. Fidelity & Casualty Co.*<sup>35</sup> Insured had purchased a standard vending machine policy which limited coverage to aircraft operated by a "Scheduled Air Carrier." Another clause defined an aircraft operated by a scheduled air carrier. It specifically excluded aircraft operated by a carrier licensed by government agencies as irregular or non-scheduled air carriers.<sup>36</sup> Insured purchased an agency ticket which was later exchanged for a carrier ticket for Peninsula Airlines, an irregular air carrier which had no established route. It appears from the opinion that such planes wait at an airport until sufficient agency tickets are sold for a given time and destination. If insufficient tickets were sold, Peninsula was not obligated to make the flight and could cancel at its prerogative. Plaintiff argued that since a time was stated on the agency ticket, the airplane was "scheduled." The court held that the definition of "an aircraft operated by a scheduled air carrier" was not ambiguous and was controlling.<sup>37</sup> The court carefully distinguished *Lachs v. Fidelity & Casualty Co.*<sup>38</sup> on the narrow ground that the court in *Lachs* was faced with interpretation of the term "Civilian Scheduled Airline" as contrasted with the "scheduled air carrier" provision before the Illinois court in *Thompson*.<sup>39</sup>

The factual distinctions between *Thompson* and other cases permitting recovery for flights on non-scheduled airlines is significant in assessing the weight to be accorded *Thompson* in a survey of aviation flight insurance cases. There is no evidence in *Thompson* to indicate that the insurance was purchased from a vending machine located directly in front of the ticket booth of a non-scheduled air carrier which one court found to constitute an offer or invitation to purchase insurance.<sup>40</sup> There was also no question of the trip being partially via a covered scheduled air carrier and partially by a non-scheduled carrier;<sup>41</sup> nor was a question of unanticipated substitute transportation presented.<sup>42</sup> The limitation of coverage was clearly stated in *Thompson* and the scheduled carrier limitation was not ambiguous when read in conjunction with other portions of the policy or in view of the surrounding circumstances.<sup>43</sup> Furthermore, the lack of published schedules and the terminable nature of the ticket were warning to the insured that the carrier was non-scheduled, notwithstanding his lack of knowledge of the type of license under which the airline operated.

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35. 16 Ill. App. 2d 159, 148 N.E.2d 9, *cert. denied*, 358 U.S. 837 (1958).

36. 148 N.E.2d at 12, 13.

37. *Id.* at 13, 14.

38. 306 N.Y. 357, 118 N.E.2d 555 (1954).

39. 148 N.E.2d at 14.

40. *Lachs v. Fidelity & Cas. Co.*, 306 N.Y. 357, 118 N.E.2d 555 (1954).

41. *Fidelity & Cas. Co. v. Commander*, 231 F.2d 347 (4th Cir. 1956); *Messina v. Mutual Benefit Health & Accident Ass'n*, 228 F. Supp. 865 (D.D.C. 1964); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

42. *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

43. *Fidelity & Cas. Co. v. Commander*, 231 F.2d 347 (4th Cir. 1956); *Messina v. Mutual Benefit Health & Accident Ass'n*, 228 F. Supp. 865 (D.D.C. 1964); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962).

Thus, *Thompson* does not represent a departure from a rule of liberal construction of ambiguous contracts in favor of the insured.<sup>44</sup>

There are other considerations to which the courts have given attention in permitting recovery by the beneficiary. Two courts have given weight to the fact that at the time the insured boarded the fatal flight, the insured had already mailed the policy to his beneficiary.<sup>45</sup> Thus, even if the insured had given further thought to his coverage when boarding a second aircraft, he would have been unable to consult his policy. In *Russell*, had the insured attempted to ascertain from insurer's agent in Lubbock whether the return flight was covered, the sales person at the booth would not likely have been able to give assistance, not knowing which of the eleven policies was purchased.

Courts have also been concerned with the question of whether a reasonable person in insured's position would feel that he was covered. Thus, the court in *Lachs* wrote that the insurance policy "... must be read through the eyes of the average man on the street or the average housewife who purchases it."<sup>46</sup> Other courts have also given consideration to the expectation of the insured<sup>47</sup> and the policy's dominant purpose to provide round trip coverage.<sup>48</sup>

None of the cases discussed involved reformation of the contract, but were concerned instead with construction of the contract. It cannot be doubted that the *Russell* policy was on its face clear and unequivocal — the insured was to be covered for a period of ninety-six hours. No rules of construction could bring the insured within the terms of the policy. Arriving at this conclusion, however, does not always leave the insured without a remedy. The ingenuity of equity courts may sometimes provide relief through the doctrine of reformation.

Reformation of a contract is proper when for various reasons, the contract as written does not express the intent of the parties.<sup>49</sup> Its purpose is "... to make the policy express the true contract which the parties intended and desired to put in writing."<sup>50</sup>

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44. *Messina v. Mutual Benefit Health & Accident Ass'n*, 228 F. Supp. 865, 868 (D.D.C. 1964); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 27 Cal. Rptr. 172 (1962). See also 13 J. APPLEMAN, *INSURANCE LAW & PRACTICE* § 7387 at 42 (1943); 1 G. COUCH ON *INSURANCE* § 15:14 (2d ed. R. Anderson 1959) [hereinafter cited as COUCH ON *INSURANCE* 2d § —]; W. VANCE ON *INSURANCE* § 136 at 809 (3d ed. B. Anderson 1951).

45. *Messina v. Mutual Benefit Health & Accident Ass'n*, 228 F. Supp. 865, 869 (D.D.C. 1964); *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 294, 27 Cal. Rptr. 172, 186 (1962).

46. 118 N.E.2d at 558.

47. *Fidelity & Cas. Co. v. Smith*, 189 F.2d 315, 318 (10th Cir. 1951).

48. *Steven v. Fidelity & Cas. Co.*, 58 Cal. 2d 862, 377 P.2d 284, 288-89, 27 Cal. Rptr. 172, 176-77 (1962).

49. See generally 13 J. APPLEMAN, *INSURANCE LAW & PRACTICE* § 7609 (1943); 17 COUCH ON *INSURANCE* 2d § 66:2, *supra* note 44; *RESTATEMENT OF CONTRACTS* §§ 491, 504, 505 (1932).

50. 17 COUCH ON *INSURANCE* 2d § 66:2, *supra* note 44. See also J. GREIDER & W. BEADLES, *LAW AND THE LIFE INSURANCE CONTRACT* 455, 456 (Rev. ed. 1968) ("The purpose of reformation is not to make a new contract but to reform the one presently existing so that it will be in the form in which it should have been expressed in the first place.").



The remedy is a limited one and wisely so. Too liberal an application of the doctrine would circumvent the parol evidence rule<sup>51</sup> and invite litigation from all parties who are disappointed because their agreement does not cover a given situation. It would seem, however, that the motive in limiting the remedy should not be to preserve the integrity of the parol evidence rule itself, but rather to preserve the reason behind the rule — the integrity of the fairly made written contract. Equity's jurisdiction to reform a contract is generally limited to situations where

. . . either through fraud of one and mistake of the other [of the parties], or mutual mistake, or because of the inadvertence, accident, mistake, or fraud of the scrivener in reducing the contract to writing, it does not embody therein the actual contract intended, or fully set forth the same. . . .<sup>52</sup>

In *Russell*, the district judge found a positive duty to explain the difference between the two principal insurance policies.<sup>53</sup> The failure to give such an explanation was a "constructive fraud"<sup>54</sup> upon which to base reformation.<sup>55</sup> The circuit court, however, found that no such duty existed, it being an impractical requirement, particularly in view of the haste with which such policies are purchased. It would seem, however, that the "time factor" argument is more appropriately made for imposing a duty than for not doing so. One who is concerned with airline time schedules is unlikely to give a great deal of thought to reading an insurance policy which he purchases as an after-thought, particularly when he believes the policy is for a round trip flight. The court indicated that there was a duty to explain the differences between the policies when there was an answer to an inquiry by a pros-

51. An exception to the parol evidence rule regarding the admissibility of parol evidence in suits for reformation is found in the RESTATEMENT OF CONTRACTS § 238 (1932): "Agreements prior to or contemporaneous with an integration are admissible in evidence . . . ; (c) to prove facts in a suit for rescission or reformation of the written instrument showing such mistake as affords grounds for the desired remedy. . . ."

52. 17 COUCH ON INSURANCE 2d § 66:20, *supra* note 44. For Maryland cases following this general proposition, *see, e.g.*, *Johnson v. Mutual Ins. Co.*, 175 Md. 543, 3 A.2d 460 (1939) (mistake must be mutual); *Mutual Life Ins. Co. v. Metzger*, 167 Md. 27, 172 A. 610 (1934) (clerical mistake justifies reformation, even though the error was made by complainant's own clerk). *See also* RESTATEMENT OF CONTRACTS § 491 (1932):

Where a written contract, conveyance or discharge owing to the fraud or misrepresentation of one party and the mistake of the other, fails to express the agreement which they had manifested an intent that the writing should express, the latter can get a decree for reformation, unless precluded by the Statute of Frauds. A further ground for reformation is found in RESTATEMENT OF CONTRACTS § 505 (1932), which provides that if, at the time of execution of a written instrument, one party knows that the instrument does not express the intention of the other party, knowing what that contention is, the latter may have the contract reformed. *See Portella v. Sonnenberg*, 74 N.J. Super. 354, 181 A.2d 385, 388 (1962) (dictum); *Volker v. Connecticut Fire Ins. Co.*, 22 N.J. Super. 314, 91 A.2d 883 (1952).

53. 402 F.2d at 342 n.9.

54. By constructive frauds are meant such acts or contracts, as, although not originating in any actual or evil design, or contrivance to perpetuate a positive fraud or injury upon other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud. . . .

1 J. STORY, EQUITY JURISPRUDENCE § 258 (2d ed. 1839).

55. 402 F.2d at 340.

pect or an affirmative statement was made by insured's agent indicating that the policy would cover the round trip.<sup>56</sup> It seems that these failures were present in *Russell*, in substance if not in form. Producing a form in response to a request for round trip coverage is indistinguishable from a response to an inquiry.

Reformation has been permitted in non-aviation situations similar to *Russell* in which the insurance policy issued fell short of that which was requested. In *Portella v. Sonnenberg*,<sup>57</sup> insured requested an insurance policy that would provide *complete* liability coverage for his furniture store. The policy that was issued excepted elevator coverage. When a person was injured on the elevator and insurer denied liability, insurer was joined as a third party defendant in a suit between the furniture store owner and the injured person. The lower court resolved the factual dispute as to the underlying negotiation in favor of the insured and granted reformation. In affirming, the appellate court held that in view of insured's request for and expectation of complete coverage, insurer's agent had a duty to point out all exclusions clearly.<sup>58</sup> *Portella* must be confined to the fact that the exception in the policy was not manifestly clear to a layman,<sup>59</sup> but the case indicates that modern judicial thinking is looking toward reliance in applying the reformation doctrine.

An analogy to the Uniform Commercial Code's warranty of fitness for a particular purpose<sup>60</sup> has been suggested in urging that the insured should be permitted to rely on the representations of the agent with whom he deals.<sup>61</sup> Such an analogy seems reasonable. The sale of insurance protection and the sale of goods are not so dissimilar that different reasoning should be applied to the two areas; the justification for permitting reliance in the insurance area may be even more compelling. In the sale of goods, the purchaser usually has some knowledge of the product he is buying to put to a particular use. The drafting of insurance contracts is often so complicated that even a well-educated layman is often unable to interpret the document. In airline insurance, even if the purchaser has the ability to interpret the document, he frequently is unable to do so in the haste of "making connections." The disappointed purchaser of goods can be made whole by an action for damages for breach of warranty. He can be put in as good a position as if the goods had been fit for the purpose intended. The dis-

56. *Id.* at 346 n.22.

57. 74 N.J. Super. 354, 181 A.2d 385 (1962), *commented on in* 17 RUTGERS L. REV. 470 (1963).

58. 181 A.2d at 388. *But see* *Sardo v. Fidelity & Deposit Co.*, 100 N.J. Eq. 332, 134 A. 774 (Ct. of Errors & Appeals 1926) in which the court refused to permit reformation of a policy where the insured sought to insure the jewelry in his jewelry store but instead received a policy covering securities. The court found that there was no evidence of mutual mistake or that the insurer intended to issue any policy other than the one actually issued. 134 A. at 775.

59. 181 A.2d at 390.

60. UNIFORM COMMERCIAL CODE § 2-315:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

61. 17 RUTGERS L. REV. 470, 474 (1963).

appointed purchaser of flight insurance cannot. He loses the benefit of the bargain he thought he had made. His only remedy appears to be to rescind the contract and obtain a refund of his premiums,<sup>62</sup> hardly adequate when such insurance was purchased with the idea of plugging gaps in his ordinary life insurance policy.<sup>63</sup> This lack of a *meaningful* remedy should be enough to justify extending the use of the doctrine of reformation beyond its present limits.<sup>64</sup>

The mere mention of allowing oral representation to overcome the written contract immediately brings to mind an abandonment of the parol evidence rule. While parol evidence is admissible in a suit for reformation,<sup>65</sup> there is still a safeguard. In a suit for reformation, the evidence of facts justifying reformation must be clear and convincing.<sup>66</sup> Such a quantum of proof is necessary since the parol evidence rule has already been invaded.<sup>67</sup> Inasmuch as the quantum of the evidence is equity's safeguard in preserving the integrity of written contracts in suits for reformation, no great harm to the stability of contracts is envisioned if the line is drawn here rather than severely limiting the types of situations in which the remedy can be granted.

### CONCLUSION

During the approximately two decades that flight insurance contracts have been the subject of litigation, courts have liberally construed such policies in favor of the insured. In reaching these results, the courts have not been unmindful of the circumstances attending the purchase of such contracts, the fact that the policies are often mailed to the beneficiary and are unavailable for reading if a question of coverage arises, and what a reasonable person in the shoes of the purchaser expects to obtain.

Where the insured has relied on the skill of the insurer's agent in selecting a policy, and by the terms of the written contract is excluded from coverage, he has not been so fortunate. Where the exclusion is clear and unambiguous, rules construing contracts against the drafter are of no help. In such an instance, the insured has two alternatives. He may rescind the contract and be placed in the position in which he would have been had he not entered the contract. Thus, he may get approximately two dollars in premiums returned to him. Such a

62. W. VANCE ON INSURANCE § 58, at 354 (3d ed. B. Anderson 1951).

63. The primary reason for purchasing this type of insurance coverage is either to provide for areas excluded from coverage by other existing policies, or to provide additional security when embarking on air travel. Comment, *Airplane Trip Insurance*, 20 WASH. & LEE L. REV. 346, 354 (1963).

64. 17 RUTGERS L. REV. 470, 475 (1963).

65. See note 46 *supra*. For a discussion of parol evidence problems in suits for reformation see Palmer, *Reformation and the Parol Evidence Rule*, 65 MICH. L. REV. 833 (1967).

66. See, e.g., *Aetna Ins. Co. v. Paddock*, 301 F.2d 807 (5th Cir. 1962) (oral agreement must be established by clear and convincing evidence and not by a mere preponderance of the evidence); *First Nat'l Ins. Co. of America v. Norton*, 238 F.2d 949 (10th Cir. 1956) (evidence must be clear and convincing but does not have to be uncontradicted); *Olinger Mut. Benefit Ass'n v. Christy*, 139 Colo. 425, 342 P.2d 1000 (1959) (evidence must be beyond a reasonable doubt). See also 17 COUCH ON INSURANCE 2d § 66:154, *supra* note 44; RESTATEMENT OF CONTRACTS § 511 (1932).

67. 17 COUCH ON INSURANCE 2d § 66:154, *supra* note 44.

remedy is grossly inadequate.<sup>68</sup> His death in an airplane crash may leave his family with no insurance protection.

He may also seek to have the contract reformed to conform to what the parties intended. Unless a court can be convinced that there was a mutual mistake, an error in reducing the agreement to writing, or unilateral mistake coupled with fraud by the other party, this remedy is foreclosed to him also. Thus, he is left with no satisfactory remedy. This absence of a remedy is made necessary only by the courts' strict adherence to existing principles of reformation. This rigid adherence to existing principles is inconsonant with recent judicial and legislative trends extending greater protection to the layman consumer.

There is some indication that reliance is becoming or should become a factor in permitting reformation of an insurance contract where no other remedy is effective. In such a situation, the weight, credibility and sufficiency of the evidence would become a check as effective as the parol evidence rule in maintaining the stability of the written contract. Not only would such a change in the law of reformation leave the stability of well-made contracts untouched, but it would go far to bring within the age of jets and vending machines the law by which such contracts are governed.<sup>69</sup>

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68. See note 63 *supra* and accompanying text.

69. Another solution to the problem may be found in the doctrine of equitable estoppel. A recent New Jersey case permitted the doctrine of equitable estoppel to bar a defense of non-coverage where the misrepresentation of insured's agent as to the coverage was relied on to insured's detriment. The court acknowledged that its holding, which would permit coverage to be *expanded* by the doctrine of equitable estoppel, was contrary to the majority rule. Nevertheless, the court found such a result to be compelled by "elementary and simple justice." *Marr v. Allstate Ins. Co.*, 54 N.J. 287, 255 A.2d 208, 218-19 (1969). For a discussion of *Russell* in which federal legislation is proposed as the best solution to the problem see Note, *Insurance — Flight Policy — Air Insurer's Failure to Explain that Different Types of Coverage Are Available Is Not Ground for Reformation*, 21 ALA. L. REV. 389 (1969).